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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CULLEN CENTER BANK & TRUST,
Petitioner,

v.

BARCLAYS BANK PLC,
Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Court of Appeals District of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether under the Full Faith and Credit Clause of the United States Constitution the Courts of Texas may refuse to respect the statutory negotiability of variable rate promissory notes, now held in interstate commerce by a regulated financial institution insured by the FDIC, created in interestate commerce under Federal Law and the Laws of Louisiana as stipulated within the four corners of such notes, and classified as negotiable instruments by the FDIC.

II.

Whether under the Due Process Clause of the Fourteenth Amendment to the United States Constitution the Courts of Texas may refuse to respect the negotiability of variable rate promissory notes, now held in interstate commerce by a regulated financial institution insured by the FDIC, created in interstate commerce under Federal Law and the Laws of Louisiana R.S. 9:3509, with choice of law and waiver of defense clauses as stipulated within the four corners of such notes, and classified as negotiable instruments by the FDIC.

III.

Whether under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution the Courts of Texas may refuse to respect the negotiability of variable rate promissory notes, now held in interstate commerce by a regulated financial institution insured by the FDIC, created in interstate commerce under Federal Law and the Laws of Louisiana with choice of law and waiver of defense clauses as stipulated within the four corners of

such notes, and classified as negotiable instruments by the FDIC.

IV.

Whether under the Supremacy Clause of the United States Constitution the Courts of Texas may refuse to respect the negotiability of variable rate promissory notes, now held in interstate commerce by a regulated financial institution insured by the FDIC, created in interstate commerce under Federal Law and the Laws of Louisiana as stipulated within the four corners of such notes, and classified as negotiable instruments by the FDIC.

V.

Whether under the due process and equal protection clauses of the 14th Amendment to the United States Constitution the Texas Courts may refuse to give due and equal enforcement to choice of law and waiver of defenses clauses under the laws of Louisiana per La. Rev. Stat. Ann. 9:3509 recited and chosen in the note and fail to uphold the negotiability of the two Louisiana variable Rate Negotiable Notes in interstate commerce under federal law.

VI.

Whether under the due process and equal protection clauses of the 14th Amendment the Court of Texas may deny full faith and credit, equal protection, and due process of law to enforce 28 U.S.C. § 1738 to secure full faith and credit for federal law and for the laws of Louisiana chosen in negotiable instruments in interstate commerce to uphold property rights in endorsement contracts on negotiable instruments in interestate commerce con-

taining choice of law and waiver of defenses clauses per Petitioner's freedom of contract and liberty interests for redress of grievances under the First Amendment in accordance with Louisiana Civil Code Articles 2276 and 2474 and the UCC Midnight Deadline Rule—Louisiana Rev. Stat. Ann. 10-4-302, and the Endorsement Contract —Louisiana Rev. Stat. Ann. 10-3-414(1), 10-3-201(3), 10-3-202(2), 10-3-307(1), 10-3-307(2), 10-3-501(4), 10-3-419(1), 10-1-105—Louisiana Choice of Law Rules, and the Louisiana Civil Code pursuant to the Order of December 5, 1989 Taking Judicial Notice of the Laws of Louisiana (App. p. 4a).

VII.

Whether under the Seventh Amendment to the United States Constitution to be extended through the Fourteenth Amendment to the United States Constitution where jury fees have been paid to and accepted by the State of Texas, the Courts of Texas may refuse to grant trial by jury as to the custom and usage of banks with respect to genuine issues of material fact concerning the negotiability in fact under the common law of variable rate promissory notes created under the federal common law of negotiable instruments in interstate commerce, where such instruments are acquired as negotiable instruments in interstate commerce by a regulated Texas financial institution insured by the FDIC with unqualified endorsement contracts on the instruments themselves for cash value received and paid to a foreign bank as endorser of such instruments in foreign commerce.

PARTIES TO THE PROCEEDING

The Plaintiff in this action is Cullen Center Bank & Trust.

The Defendant in this action is Barclays Bank, PLC.

This Petition for Certiorari is brought by Cullen Center Bank & Trust.

The parent corporation of Cullen Center Bank & Trust is Cullen/Frost Bankers, Inc

(Cullen Center Bank & Trust has no subsidiaries to be listed.)

Barclays Bank, PLC is the same as Barclays Bank, Ltd. and as Barclays Bank International Limited.

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Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Court of Appeals District of Texas

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cullen Center Bank & Trust respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Court of Appeals District of Texas made final as of October 9, 1991.

OPINION BELOW

The opinion and judgment of the Court of Appeals for the Fourteenth Court of Appeals District of Texas appears in WestLaw (1990 WL 205378). Otherwise the opinion is unpublished.

The style of the unreported case sought to be reviewed is as follows: *Cullen Center Bank & Trust v. Barclays Bank, PLC, et al.*, No. B-14-90-365-CV, 14th Court of Appeals, State of Texas at Houston, Texas; No. D-0845, Supreme Court of Texas, writ denied.

JURISDICTION

The judgment and opinion of the Court of Appeals was rendered on December 13, 1990. Appellant's motion for rehearing was overruled by the Court of Appeals on January 31, 1991. Upon an application for writ of error (discretionary review), the Supreme Court of Texas denied writ of error September 5, 1991. A motion for rehearing on the application for writ of error was overruled October 9, 1991 as shown in the unpublished orders of the Texas Supreme Court. This petition for certiorari has been filed within ninety days after the entry of the order of the Supreme Court of Texas denying discretionary review and finalizing the judgment of the Court of Appeals under 28 U.S.C. Section 2101 (c), thus satisfying the 90 day time requirements for filing a petition for writ of certiorari under Rule 13. Rules of the Supreme Court of the United States. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. Section 1257(3).

* * * *

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Full Faith and Credit Clause of the United States Constitution Article IV, Section 1: "Full Faith

and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

(2) Fourteenth Amendment, Section 1 to the Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) The Supremacy Clause of the United States Constitution,—Article VI Clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(4) 28 U.S.C. Section 1738: "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof shall be authenticated by affixing the seal of such State, Territory or Possession thereto."

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possession, by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form."

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

(5) Statutes entitled to Full Faith and Credit 28 U.S.C. 1738:

Louisiana Civil Code Article 2276: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them or since."

Louisiana Civil Code Article 2474: "The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him." *CAVEAT VENDOR*—emphasis added).

Louisiana Civil Code Article 2475: "The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells."

Louisiana Civil Code Article 2476: "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices."

Louisiana Civil Code Article 2642: "In the transfer of credits, rights or claim to a third person, the delivery takes place between the transferrer and the transferee by the giving of the title."

Louisiana Civil Code Article 2645: "The sale or transfer of a credit includes every thing which is an accessory to the same; as suretyship, privileges and mortgages."

Louisiana Civil Code Article 2545: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of expenses, *is answerable to the buyer in damages.*" (Emphais added.)

Louisiana Civil Code Article 2646: "He who sells a credit or an incorporeal right, warrants its existence at the time of the transfer though no warranty be mentioned in the deed."

Louisiana Civil Code Article 2649: "If it be proved that the assignor, who has not warranted the solvency of the debtor, knew or had strong reasons to suspect that the debtor was insolvent at the time of the assignment, the contract may be rescinded, and the assigner compelled to restore the price."

Louisiana Civil Code Article 2236: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."

Louisiana Civil Code Article 2242: "An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."

Louisiana Civil Code Ancillaries Rev. Stat. Ann. 9:3509.1.A: "Notwithstanding any other provisions of the law to the contrary, any person borrowing funds for commercial or business purposes, or deferring payment of an obligation for commercial or business purposes, may agree that the interest rate that is charged on the indebtedness may vary from time to time in accordance with the provisions of either the promissory note or other evidence of the indebtedness. Such conditions in either the promissory note or other evidence of the indebtedness shall not be deemed to be potestative nor shall such conditions destroy the negotiability of the promissory note or other evidence of the indebtedness."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-1-105 Uniform Commercial Code Section 1-105(1): "Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-201 Uniform Commercial Code Section 3-201(3): "Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-202 Uniform Commercial Code Section 3-202(2):

"An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-307 Uniform Commercial Code Section 3-307(1): "Unless specifically denied in the pleadings each signature on an instrument is admitted."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-307 Uniform Commercial Code Section 3-307(2): "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-414 Uniform Commercial Code Section 3-414(1): "Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the endorser who takes it up was not obligated to do so."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-501 Uniform Commercial Code Section 3-501(4): "Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-3-419 Uniform Commercial Code Section 3-419(1): "An instrument is converted when (a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or (b) any person to whom it is delivered for pay-

ment refuses on demand either to pay or to return it; or (c) it is paid on a forged endorsement."

Louisiana Uniform Commercial Code Rev. Stat. Ann. 10-4-302 Uniform Commercial Code Section 4-302: "In the absence of a valid defense such as a breach of a presentment warranty (subsection (1) of Section 4-207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of (a) a demand item other than a documentary draft WHETHER PROPERLY PAYABLE OR NOT (emphasis added) if the bank, in any case where it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or (b) any other properly payable item unless within the time allowed for acceptance or payment of that item the bank either accepts or pays the item or returns it and accompanying documents."

(6) The First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances."

(7) The Seventh Amendment to the United States Constitution:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury

shall be preserved, and no fact tried to a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This is a critical case of first impression for the Nation concerning the negotiability vel non in interstate commerce of variable interest rate notes and the uniform collectability of the same as the last lifeblood of F.D.I.C. insured banking. Literally millions, billions, and even trillions are at risk.

It is the province of the United States Government to decide what is or is not a negotiable instrument in interstate commerce where such instruments are held by an FDIC insured institution. There must be a national uniform rule for FDIC insured banks. Respondent contends that the Louisiana notes are not negotiable instruments because their variable interest rates are not a sum certain in money, and that extrinsic evidence should be used to relieve Barclays of its obligations as endorser of the notes. Petitioner contends that federal common law and the Laws of Louisiana make the notes negotiable instruments and that the notes do satisfy the sum certain test as declared by the federal courts for negotiability, hence extrinsic evidence is excluded. *Tanenbaum v. Agri-Capital, Inc.* 885 F.2d 464, 468 (8th Cir. 1989): "The test for "certainty" as it concerns the amount payable under an instrument for it to constitute certainty is not mathematical certainty, but commercial certainty." Under federal common law and the laws of Louisiana extrinsic evidence can confirm but cannot controvert any liability on a negotiable instrument. "The purchaser is not obligated to look beyond the instrument." *Shaw*

v. Merchants Nat. Bank of St. Louis, 101 U.S. 557, 562, 25 L.Ed. 894 (1880). Thus the holder need not look outside of the instrument if it contains "words of negotiability"—i.e. payable "to order" or "to bearer". *Mercer v. Hackett,* 1 Wall, 83, 95, 17 L.Ed. 548, 550 (1864), *Knox v. Aspinwell.* 21 How. 539, 16 L.Ed. 208, 210 (1859), *D'Oench, Duhme & Co. v. F.D.I.C.,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). Likewise, variable rate notes are negotiable if they contain words of negotiability. See the recent case of *Schwegmann v. Falkenberg* 931 F.2d 1081, 1083-1084 (5th Cir. 1991); "This finding is consistent with the comment to section 3-104, which provides that "some writings may be made negotiable by other statutes or by judicial decision." La. Rev. Stat. Ann. 10-3-104 comment 1." La. Rev. Stat. Ann. 9:3509.1 A.

Petitioner, Cullen Bank filed this suit against Respondent, Barclays Bank seeking to hold Barclays liable as an indorser of two Louisiana promissory notes for $5 Million and $700,000.00 respectively, of which ABCO Energy Corporation was maker, created under the codified laws of Louisiana and the federal common law of the United States of America in interstate commerce, indorsed without qualification by Barclays and delivered by Barclays to Cullen for value received with choice of law and waiver of defense clauses giving Cullen all of the rights of a holder through a holder in due course. Such notes joined the stream of interstate commerce and were passed into Texas by Barclays Bank of London, England. Cullen refused to acquire either of the two ABCO notes without the unqualified endorsements of Barclays Bank on both notes because Cullen could not confirm ABCO's alleged collateral which Barclays claimed

existed. On July 8, 1983, these two notes were purchased for value after maturity in a separate transaction with Barclays, after ABCO borrowed funds from Cullen with which all arrearages in the notes were brought current and were no longer overdue, thereby obtaining unconditional, unqualified indorsements from Barclays on the two notes in favor of Cullen as third party beneficiary. Cullen Bank contends that, because Barclays indorsed the Notes after maturity *without* any *qualified* indorsement language *on* the Notes themselves, Barclays is liable for payment of the Notes as an absolute indorser. Barclays contends that a separate U.C.C. financing statement document prepared by Barclays, but never agreed to by Cullen, entitled "Assignment of Promissory Notes, Liens and Security Interests", operates to limit Barclays' liability as an endorser, as it contained extrinsic language which Barclays claims should be allowed to limit the endorsements on the Notes. Cullen plead and proved the law of Louisiana which excludes any extrinsic evidence by Barclays to negate waiver of defense clauses and contractual liabilities in the notes themselves including the liability of indorsers of notes in interstate commerce. Cullen drafted on Barclays for acceptance and payment of the $700,000 Note, which was delivered to Barclays and accepted for payment April 30, 1987 by Barclays. Thereafter, Barclays neither paid nor returned the $700,000 Note to Cullen. Barclays claimed that the $700,000 variable rate note was non-negotiable and thus Barclays claimed it was not liable under the Bank Midnight Deadline Rule or for conversion (UCC 3-419 & 4-302) if the items were non-negotiable. Cullen claims a conversion, and that the Midnight Deadline Rule applies strict liability to all items not returned or paid by the Bank's Midnight Deadline including the

$700,000 note and draft thereon. Jury fees were paid by both parties; however the district court judge insisted on presiding as arbitrator in an "ADR Mini-Trial" without any jury. The judge persisted in examining sealed offers of settlement from both parties, and lost any remaining shred of impartiality. The unsuccessful attempt at alternative dispute resolution in district court was no substitute for an actual trial with a jury. No jury trial was ever held, despite the demand for a jury by Cullen under federal law. After an order taking Judicial Notice of the Laws of Louisiana on December 5, 1989 was made as demanded pursuant to the Full Faith and Credit Clause of the United States Constitution and 28 U.S.C. Section 1738, the Texas District Court thereafter refused to give Full Faith and Credit to the Laws of Louisiana and gave an arbitrary and capricious Summary Judgement by Court Order erroneously disposing of Cullen's claims of federal and Constitutional rights signed on March 2, 1990.

The Texas Court of Appeals breached the federal questions, and affirmed despite Petitioner's federal and Constitutional claims to Full Faith and Credit for the Laws of Louisiana. This order was finalized October 9, 1991 by refusal of discretionary review in the Texas Supreme Court—with all material facts still remaining unagreed—and with no fact in this case ever tried to any jury, the federal questions were entirely wrongly decided.

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE TIMELY RAISED.

The laws of Louisiana include and are the same as the federal statutory and common law of negotiable in-

struments in interstate commerce. Petitioner raised the federal issues to be reviewed in the district court (App. 19a-23a) in its first amended and restated original petition responding to Barclays claim that it was above U.S. law as an English Bank. "The laws of Louisiana and the Constitution are not "technicalities"—they are the Law of the Land entitled to Full Faith and Credit under the United States Constitution." Barclays must yield to the Constitution.

Demand was made for trial by jury under the Constitution (App. 18a) invoking the 5th Amendment Due Process, Supremacy Clause, Interstate Commerce Clause, Full Faith and Credit Clause, and the Due Process and Equal Protection Clauses of the 14th Amendment which should be applied to decide the disputed facts of this case under the 7th Amendment which should be extended to Texas, given the facts of this case, the demand for jury trial, and the jury fees paid to and accepted by the State of Texas in this case.

Judicial Notice was taken of the Laws of Louisiana by Order signed December 5, 1989 (App. 4a). This final order was misconstrued by the Texas Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Texas courts have decided federal questions in a way in conflict with applicable decisions of this Court. Rule 10 (c), Rules of the Supreme Court of the United States. The Constitution is the Supreme Law of the Land. So it must remain in Texas also.

The notes in question are Louisiana contracts governed by the internal laws of Louisiana as stipulated in the notes. (App. 10a). Other matters aside, the contention

that the contracts are governed by the laws of Louisiana—including federal law, rather than by Texas law, as the United States Supreme Court has said: "clearly presents a substantial question under the full faith and credit clause of the Constitution." *Aetna Life Insurance Co. v. Dunken* 266 U.S. 389, 45 S. Ct. 129 at 130 (1924). This suit raises important questions not only to Louisiana but to 27 States with similar laws recognizing the negotiability of variable rate notes in interstate commerce. The Supreme Court, if the laws and Constitution of the United States are to be observed *cannot* "accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of local courts, but upon the law of another state, as readily determined here as in a state court." *Adam v. Saenger*, 303 U.S. 59, 58 S. Ct. 454, 457 (1938). The Louisiana contracts at issue here are interstate in nature.

Congress has created the Federal Reserve and the FDIC to regulate banks and banking transactions in interstate commerce. Texas does not have the right to regulate interstate commerce.

Louisiana notes held in Texas by an FDIC insured institution endorsed by an English Bank are contracts in interstate commerce. The federal common law and statutory law governing negotiable instruments in interstate commerce held by F.D.I.C. insured institutions must be vindicated in order to assure national uniformity and fairness in the F.D.I.C. insurance program.

The larger question squarely presented is whether a variable interest rate note is a negotiable instrument under

Federal law. This is the cornerstone of the Federal Holder in Due Course Doctrine, and national uniformity, through the federal common law is the essential element in the treatment of variable rate notes in interstate commerce, necessary to protect the public interest in the FDIC insurance fund. (If variable Rate Notes are suddenly treated as non-negotiable instruments so that the Federal Holder in Due Course Doctrine does not apply to these instruments which are the bulk in value of all note portfolios now owned by the FDIC, then the solvency of the FDIC insurance fund will again be endangered nationwide and a New Great Depression will befall us).

The central statute at issue is the law of Louisiana recognizing variable rate notes as negotiable instruments outside of the Uniform Commercial Code under federal common law. Texas courts have no right to repeal the laws of sister states, to interfere with interstate commerce, or to ignore the United States Constitution on a case by case basis or otherwise as the Texas Courts have done to date to discriminate against petitioner and to deprive petitioner of its property without due process of law. *D'Oench Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L.Ed 956 (1942) and *Clearfield Trust Co. v. United States*, 318 U.S. 363, 318 U.S. 744, 63 S. Ct. 573, 87 L.Ed. 838 (1943) are the Law of the Land. It must remain the law.

The laws of Louisiana include the laws of the United States. *Claflin v. Houseman, Assignee*, 93 U.S. 130, 136 (1876): "The laws of the United States are laws in the several States." Cullen Bank is a financial institution regulated by the FDIC. The laws of Louisiana recognized the notes as being negotiable. The FDIC classifies both such notes as negotiable instruments, and Cullen Bank ac-

quired both notes as negotiable instruments. Once payable to order or to bearer the notes remain negotiable under the federal common law in interstate commerce, which only the United States has the Constitutional power to regulate. Now the State of Texas seeks to overthrow the FDIC's rational test for a uniform national standard of negotiability in FDIC banks.

"Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world." *Ross v. Jones,* 89 U.S. 576, 594, 22 L.Ed. 730, 736 (1874). Property rights which thus arise under the laws of Louisiana and the United States Constitution cannot be summarily taken away under color of state action by unconstitutional abuses in Texas. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986).

Endorsement contracts on notes give rise to property rights which are Constitutionally protected in interstate commerce. Petitioner has been deprived of its property without due process with respect to more than $3.2 million dollars of endorsed notes.

FDIC regulated institutions in Texas alone hold billions of dollars invested in variable rate notes based on their federal classification as negotiable instruments. Nationwide and on a worldwide basis there are trillions of dollars at risk in similar variable rate notes legally classified as negotiable instruments.

The doctrine of incorporation by reference does not apply to endorsements. Where there is a conflict between valid intrinsic evidence in the language of the note—including any endorsements thereon—and invalid con-

tradictory or ambiguous extrinsic evidence the extrinsic evidence is excluded and only the intrinsic evidence on the note itself is considered. To do otherwise would destroy the D'Oench Duhme Doctrine and uniform federal common law which must be upheld under the Constitution. All FDIC insured banks, their customers, and the taxpayers depend on the uniform fair treatment and classification of variable rate notes as negotiable instruments in interstate and foreign commerce moving by endorsement without being burdened by any collateral baggage. It is critical that bankers, bank examiners, and businessmen be able to instantly inspect and evaluate the instrument itself without fear of being delayed or bound by secret agreements or any other conflicts outside the negotiable instrument itself.

The courts look to the business world to decide what is in fact a negotiable instrument. *Goodwin v. Robarts* (Lords 1876), *Vermilye & Co. v. Adams Express Co.*, 88 U.S. 138, 22 L.Ed. 609 (1874).

The law respecting negotiable instruments may be truly declared to be not the law of a single country only but of the entire commercial world as stated by Lord Mansfield and approved by the United States Supreme Court in *Ross v. Jones,* 89 U.S. 576, 594, 22 L.Ed. 730, 736 (1874) and *Goodman v. Simonds,* 61 U.S. 343, 364 (1857). A negotiable instrument is one payable "to order or to bearer." Cullen's property cannot be summarily taken away without trial.

In the undying words of the United States Supreme Court:

"The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper

sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less, on that account, perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such an instrument upon an abbreviation. So that the mere name of the indorser, signed on the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full." *Martin v. Cole,* 104 U.S. 30, 37 (1881). This is a further proof of federal common law.

What the Texas Courts did was Unconstitutional. Trial by Jury is far too sacred a right to be arbitrarily taken away by Judges whenever it may please them. Summary Judgments are not expedient alternatives to true Justice and the Constitutional Rights guaranteed to every citizen. Cullen requested a jury trial, paid the jury fee and must have a jury trial at the very minimum under the circumstances of this case to weigh all of the conflicting factual evidence.

Barclays chose to do its business in New Orleans, Louisiana. The internal laws of Louisiana chosen in the note must be applied as previously ordered by the Court which paid lip service to the United States Constitution by recognizing the laws of Louisiana which were and are entitled to full faith and credit under the Constitution—but which have since been ignored: "This note shall be governed and controlled by the internal

laws of the State of Louisiana." (App. 10a). "Maker hereby acknowledges full knowledge of Louisiana Revised Statutes Title 9 Section 3509." (App. 9a recognizing the note as a negotiable instrument under federal common law in interstate commerce outside the UCC). "Maker and any and all ENDORSERS, guarantors and sureties severally WAIVE notice, demand, presentment for payment, protest and the FILING OF SUIT hereon for the purpose of FIXING LIABILITY and consent that the time of payment hereof may be extended and re-extended from time to time without notice to them or any of them." (App. 10a waiver of defense clause gives Cullen all rights of a holder in due course) — EMPHASIS ADDED. "The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him." Louisiana Civil Code Article 2474. "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since." Louisiana Civil Code Article 2276. "WITHOUT BEING LIMITED THERETO OR THEREBY, this Note is secured by a Deed of Trust, Security Agreement, Financing Statement and Assignment." (App. 10a Financing Statement and Assignment are security only).

Barclays central contention is that its liability should be limited because of miscellaneous language in its UCC Financing Statement. As a matter of law, no extrinsic language in any such Financing Statement (which was not signed or agreed to by Cullen) can vary or modify the unqualified language of the endorsements on the notes, simply because the extrinsic language was not part of the endorsements on the notes. Louisiana Rev. Stat. Ann. UCC Section 10:3-202(2): "An endorsement must be

written by or on behalf of the holder and ON THE INSTRUMENT (emphasis added) or on a paper so firmly affixed thereto as to become a part thereof." Such a paper is called an allonge. NO LIMITING LANGUAGE WAS ON EITHER the $5 Million Dollar Note or the $700,000 Note, and therefore BARCLAYS LIABILITY FOR ITS ENDORSEMENTS IS NOT LIMITED.

"Unless the ENDORSEMENT otherwise specifies, as by such words as "without recourse" EVERY ENDORSER ENGAGES that upon dishonor and protest he will pay the instrument according to its tenor at the time of its endorsement to the holder or any subsequent endorser who takes it up, even though the endorser who takes it up was not obligated to do so." (Emphasis added) Louisiana Rev. Stat. Ann. UCC 10:3-414(1). Official Comment 1 to this section provides in part: "The endorser's engagement runs to any holder (whether or not for value). An endorser may disclaim his liability ON THE CONTRACT of endorsement, BUT ONLY IF THE ENDORSEMENT ITSELF SO SPECIFIES. . . . Apart from such a disclaimer all endorsers incur this liability, without regard to whether or not the endorser transferred the instrument for value or received consideration for his endorsement." (Emphasis added).

Accordingly, under Louisiana law, Barclays is liable to Cullen for all dishonored funds advanced under the promissory notes in the minimum sum of $3.2 million. These dishonored funds include the $2.5 million advanced by Cullen under the second note and the $700,000 advanced under the first note—each endorsed by Barclays. Furthermore, an endorser of a promissory note after maturity is primarily liable for payment of the note. UCC 3-501. See Louisiana Rev. State. Ann. 10:3-501(4) Official Comment 8.

After all credits a minimum of $3.2 Million remains due. To add insult to injury, Barclays has kept both the $700,000 Note converted in violation of the Midnight Deadline (UCC 4-302) and the $700,000 cash initially received from Cullen Bank. In plain terms, Cullen simply wants all its money back. It is high time. Justice delayed is justice denied. The law must be upheld.

Now Cullen cries out again for Equal Justice under Law. Barclays Bank is not above the law and must not be allowed to act above the law. At the very minimum this case should be returned for Jury Trial as plead for by Cullen with full faith and credit, due process, and equal protection of law which Cullen has never yet received from the Courts of Texas under the United States Constitution to recover $3.2 Million dollars paid out by Cullen which Barclays is obligated to pay back under its endorsements.

The Constitutional confusion in the Texas Courts defies rationalization. It was not the prerogative of the Texas Court of Appeals to make oral arguments outside of the record into facts by its opinion. Nor was it the right of the Texas Court of Appeals to make law out of whole cloth for the Nation, for Louisiana, or for any of the 27 sister states with general laws recognizing the creation of variable rate notes as negotiable instruments. None of the 50 States legislatures has declared variable rate notes to be non-negotiable. The Supreme Court of Texas has not spoken; and the Texas Court of Appeals has no right to deprive Cullen Bank of its property in interstate commerce.

Ever since the time of Queen Anne instruments have been separately recognized as negotiable by common law

and by statute. Please see for example the recently enacted Florida Statutes: 1991 Regular Session Section 673.106 at pages 429-430 (West 1991) and section 5 thereof in particular concerning confirmation, clarification and codification of existing VRN law: "In enacting the revisions to s. 673.106, Florida Statutes, the Legislature intends to clarify and confirm existing law." Also see the list of all 27 state statutes in the appendix (App. 2a-4a). Once created as negotiable instruments payable to order or to bearer in interstate commerce, such instruments are governed by the federal common law—not by narrow rules of intra-state commerce.

The Texas Courts have no right to deny the laws of Louisiana full faith and credit, to repeal federal law, or to ignore the United States Constitution in summary fashion. Petitioner has been denied fundamental rights in Texas, and deprived of its property, due process and equal protection of the laws in petitioning for redress of grievances to obtain payment for its notes endorsed in interstate commerce as Constitutionally mandated by the Full Faith and Credit clause.

Texas Courts have ignored their duty to enforce the federal rights of petitioner. *Mondou v. New Haven & Hartford Ry. Co.*, 223 U.S. 1, 56 L.Ed. 327, 32 S. Ct. 169 (1912). Full Faith and Credit, Due Process, and Equal protection of Law must be upheld by the courts to protect private property and federal interests.

Full Faith and Credit to the laws is critical to federalism as stated on the floor of the Constitutional Convention in 1787. Madison's *Reports of the Debates in the Federal Convention of 1787*, Hunt and Scott ed. p. 503, and likewise freedom of contract and the fair and impartial enforcement of laws by the judiciary—as

stated by Hamilton in *The Federalist No. 82*, McLean ed. 1788: "This I infer from the nature of judicial power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." Thus, the federal common law of negotiable instruments, which is the same as the international law merchant, uniformly determines negotiability rights in interstate commerce via the Constitution.

"What is negotiability?" — as the United States Supreme Court said in *Shaw v. Merchants Nat. Bank of St. Louis*, 101 U.S. 557, 562, 25 L.Ed. 892 (1880): "It is a technical term derived from the usage of merchants and bankers transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable so as to give the assignee a right to enforce it by suit in his own name. To this rule, bills of exchange and PROMISSORY NOTES PAYABLE TO ORDER OR TO BEARER (emphasis added), have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by endorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give the endorsee a right to sue on the contract in his own name, is what constitutes negotiability." See The Pomerene Act 49 U.S.C. 81, et seq. at Sections 83 and 86) which reflects the universal mercantile rule of the federal common law and the international law merchant that

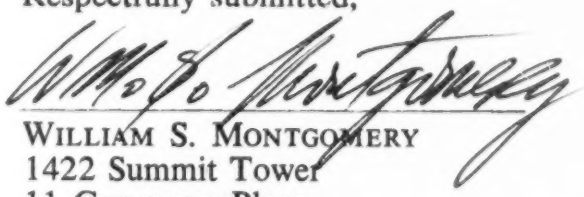
if a commercial instrument is not to be negotiable it must say so plainly on the face of the instrument. Under federal law if a commercial instrument is payable to order or to bearer it is negotiable. "The contracts on a bill, as interpreted by the law merchant, are contracts in writing. Extrinsic evidence is not admissible to vary their effect." *Martin v. Cole,* 104 U.S. 30, 37 (1881). This is the law of the land in interstate commerce. As Chief Justice Marshall said "In considering this question, then, we must never forget, that it is a Constitution we are expounding." *M'Culloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819).

The Constitution must be fully observed.

CONCLUSION

The federal questions presented are of importance to the jurisprudence of the nation. If ignoring federal claims and refusing to address them is tolerable, then the federal claims are meaningless and the supreme law of the land is diminished. Writ of Certiorari should issue to uphold the Constitution.

Respectfully submitted,



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Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

NO. _____

CULLEN CENTER BANK & TRUST,
Petitioner,

v.

BARCLAYS BANK PLC,
Respondent.

APPENDIX

APPENDIX A

STATE STATUTES CONFIRMING THE EXISTING NEGOTIABILITY OF VRN'S (ALL FAVORING THE NEGOTIABILITY OF VARIABLE RATE NOTES)

1. Ariz. Rev. Stat. Ann. § 47-106(B) (Supp. 1990).
2. Ark. Stat. Ann. § 4-3-112, Act of July 15, 1991, No. 572, ACA § 4-3-112 (Westlaw).
3. Cal. Com. Code § 3106(2) (West Supp. 1990).
4. Conn. Gen. Stat. Ann. § 42a-3-112, Act of June 24, 1991, P.A. 91-304, 1991 Conn. Legislative Service 602, 609-610.
5. Del. Code Ann., tit. 6, § 3-106(1)(f) (Supp. 1990).
6. Fla. Code Ann. Stat. Ann. § 673.106, Act of May 9, 1991, Ch. 91-70, 1991 Fla. Session Law Service 412, 429-430 (West).
7. Haw. Rev. Stat. § 490:3-112), Act of May 10, 1991, Act 118, 1991 Hawaii Laws ACT 118 (S.B. 1714 (Westlaw).
8. Ind. Code Ann. § 26-1-3-106(1) (Michie Supp. 1990).
9. Iowa Code Ann. § 554.3106(1)(f).
10. Kansas, Act of May 20, 1991, Ch. 296, 1991 Kansas Laws Ch. 296 (West's 262) (S.B. No. 371) (Westlaw).
11. Ky. Rev. Stat. Ann. § 355.3-106(2) (Michie-Bobbs-Merrill Supp. 1990).
12. La. Rev. Stat. Ann. § 9:3509.1A, La. Civil Code Ancillaries (1981)—outside U.C.C. confirming cus-

tom and usage under the international law merchant and federal common law of negotiable instruments in interstate and foreign commerce, and § 10:3-106 (1)(a) (West Supp. 1990)—inside U.C.C.

14. N. Y. U.C.C. Law § 3-106(2) (West Supp. 1991).

14. Md. Com. Law Code Ann. § 3-106(2) (Michie Supp. 1990).

15. Miss. Code Ann. § 75-3-106(2) (Supp. 1990).

16. Mo. Ann. Stat. § 400.3-106(2) (West Supp. 1991).

17. Montana, Act of April 10, 1991, Ch. 410, 1991 Montana Laws Ch. 410 (S.B. 1) (Westlaw).

18. Nebraska. Act of April 10, 1991, L.B. 161, 1991 (Nebraska Laws L.B. 161 (Westlaw).

19. Nev. Rev. Stat. Ann. § 104.3106(2) (Michie Supp. 1989).

20. N. D. Cent. Code § 41-03-06(1)(f) (Michie Supp. 1989).

21. Oklahoma by Recent Decision of Oklahoma Supreme Court—*Goss* and in clarification thereof: Okla. Stat. Ann. § 3-112, Ch. 117, (1991).

22. Or. Rev. Stat. § 73.1060 (1989).

23. Tenn. Code Ann. § 47-3-104(1)(b) and § 47-3-106(1)(f) (Michie Supp.).

24. Va. Code Ann. § 8.3-106(2) (Michie Supp. 1990).

25. Wash. Rev. Code Ann. § 62A.3-106(2) (West Supp. 1991).

26. W. Va. Code § 46-3-106(1) (Michie Supp. 1990).

27. Wyo. Stat. Ann. § 34.1-3-112, Act of February 27, 1991, Ch. 160, W.S. 1977, § 34.1-3-112 (Westlaw), to be codified as shown.

28. Indian Lands per Navajo Tribal Code and 25 C.F.R. 101.11.

(All Indian Lands in Texas and in Interstate & Foreign Commerce).

APPENDIX B

NO. 87-24794

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
190TH JUDICIAL DISTRICT

CULLEN CENTER BANK & TRUST

v.

BARCLAYS BANK PLC, ET AL.

ORDER TAKING JUDICIAL NOTICE OF
THE LAWS OF THE STATE OF LOUISIANA

BE IT REMEMBERED that on this day came on to be heard Plaintiff, CULLEN CENTER BANK & TRUST's Motion to Take Judicial Notice of the Laws of the State of Lousiana, and the Court, after consideration of same, and after hearing evidence and arguments of counsel, is of the opinion this order should be made; it is therefore

ORDERED, ADJUDGED AND DECREED that Cullen's Motion to Take Judicial Notice of the Laws of the State of Louisiana shall be and is hereby

GRANTED.

SIGNED this —— day of December 5, 1989.

/s/ WYATT H. HEARD
Wyatt H. Heard
Judge Presiding

APPENDIX C

SECRETARY OF STATE
Baton Rouge, Louisiana

UNITED STATES OF AMERICA
STATE OF LOUISIANA

(SEAL)

FOX McKEITHEN
Secretary of State

As Secretary of State, of the State of Louisiana, I do hereby Certify that the attached is a true and correct copy of Article 2276 of the Louisiana Civil Code which was in effect on July 8, 1983, as shown by comparison with said articles on file in the archives of this office.

Art. 2276. Parol evidence relative to written instruments.

Art. 2276. Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since.

(SEAL)

/s/ FOX McKEITHEN
Secretary of State

APPENDIX D

PROMISSORY NOTE

$5,000,000 New Orleans, Louisiana April 28, 1982

FOR VALUE RECEIVED and WITHOUT GRACE, on or before March 31, 1983, the undersigned ("Maker", whether one or more) promises to pay to the order of BARCLAYS BANK INTERNATIONAL LIMITED ("Payee"), at its banking quarters in New Orleans, Louisiana, the sum of FIVE MILLION DOLLARS ($5,000,000), or so much thereof as may be advanced to Maker by Payee, together with interest at a rate per annum equal to the Prime Rate (as hereinafter defined), from time to time in effect, plus one and one-half percent (1½ %) (hereinafter referred to as the "Floating Rate"), calculated on a year of three hundred sixty-five (365) days or three hundred sixty-six (366) days, as the case may be; provided, however, that it is the intention of Maker and Payee to comply strictly with all applicable usury laws, and there is no intention to contract for, nor shall there ever be collected, charged or received on this Note, interest in excess of the maximum non-usurious rate permissible under the laws of the State of Louisiana or the United States of America, whichever is greater (the "Maximum Rate"). The Floating Rate shall not originally be, nor ever be increased to, a rate greater than the maximum non-usurious contract rate of interest (determined from time to time) that Payee may charge Maker under applicable law and in regard to which Maker would be prevented successfully from raising the claim or defense of usury. The Floating Rate will be determined on a daily basis, the first such determination being made on the date

the Payee advances any portion of the principal of this Note, and other determinations being made on any date upon which a change in the Prime Rate (as hereinafter defined) becomes effective, *provided*, if a change is prevented because of the then applicable Maximum Rate, and the Maximum Rate subsequently increases, then change(s) in the Floating Rate will be suspended until appropriate increase(s) in the Maximum Rate are made. It is agreed, however, that if the Prime Rate, originally or subsequently calculated, causes the Payee to charge a Floating Rate equal to the Maximum Rate for any period, and which Floating Rate, but for the application of the preceding sentence, would have been higher than the Maximum Rate, then upon subsequent decrease in the Prime Rate which would cause the Floating Rate to be less than the Maximum Rate, Maker shall continue to pay the Maximum Rate until Payee shall have collected all of the interest Payee did not collect because of the application of the preceding sentence; thereafter, the Floating Rate will again apply unless and until the same circumstances occur. It is further agreed that if the Maximum Rate is, subsequent to the date hereof, increased by statute or other official action, then Maker agrees that the new Maximum Rate will be applicable to this Note and the loan evidenced hereby from the effective date of the new Maximum Rate forward, unless such application is precluded by the relevant statute or official action, or by the general law of the applicable jurisdiction. All past due interest and principal shall bear interest at the greater of (a) the Floating Rate or (b) the Maximum Rate.

Each advance by Payee to Maker and each payment of principal hereunder by Maker shall be reflected by

a notation made by Payee on its records and the aggregate unpaid amount of advances reflected by said notations shall be deemed rebuttably presumptive evidence of the principal amount owing under this Note.

The term "Prime Rate" shall mean the prime commercial interest rate charged by Payee as announced or published by Payee from time to time for short term loans to its most creditworthy commercial and industrial borrowers, which Prime Rate shall change as and when said prime commercial loan rate shall change. Notwithstanding anything in this Note to the contrary, if during any period ("Limitation Period") the calculation of interest at the Floating Rate would result in interest in excess of the Maximum Rate, then during such Limitation Period the interest rate to be charged under this Note shall be the Maximum Rate allowed by law. During any period or periods of time following a Limitation Period the interest rate too be charged hereunder shall remain at the Maximum Rate until such time as there has been paid to Payee (i) the amount of interest in excess of the maximum non-usurious amount that Payee would have received during the Limitation Period had the interest rate remained fixed at the Floating Rate, and (ii) all interest otherwise due to the Payee.

If under any circumstances the aggregate amounts paid on this Note include amounts which by law are deemed interest and which would exceed the maximum non-usurious amount of interest which could lawfully have been collected on this Note, Maker stipulates that such payment and collection will have been and will be deemed to have been the result of mathematical error on the part of both Maker and Payee or the holder of this Note, and the party receiving such excess pay-

ments shall promptly refund the amount of such excess (to the extent only of such interest payments above the maximum non-usurious amount which could lawfully have been collected and retained) upon discovery of such error by the party receiving such payment or notice thereof from the party making such payment. Maker hereby acknowledges full knowledge of Louisiana Revised Statutes Title 9 Section 3509.

The principal indebtedness due on this Note shall be paid on or before March 31, 1983.

Interest on principal amounts evidenced hereby and calculated as provided herein shall be due and payable monthly as it accrues commencing on the 1st day of June, 1982 and continuing thereafter on the first day of each succeeding calendar month while any amount remains owing on this Note, the interest payment in each instance to be that which has been earned and remains unpaid.

If any installment herein provided for is not paid when due, then Payee or the owner or holder hereof may, at its option, without notice or demand, declare this Note at once matured, due and payable in full and in such case the entire amount of unpaid principal hereunder and accrued interest thereon shall immediately become due and payable.

If default is made in the payment of this Note and it is placed in the hands of an attorney for collection, or collected through probate or bankruptcy proceedings, or if suit is brought on the same, Maker agrees to pay reasonable attorney's fees and other costs of collection.

Maker and any and all endorsers, guarantors and sureties severally waive notice, demand, presentment for payment, protest and the filing of suit hereon for the purpose of fixing liability and consent that the time of payment hereof may be extended and re-extended from time to time without notice to them or any of them.

Maker may at any time pay the full amount or any part of this Note without the payment of any premium or fee, but such payment shall not, until this Note is fully paid and satisfied, excuse the payment as it becomes due of any installment herein provided for.

This Note is issued pursuant to a Loan Agreement of even date herewith by and between Maker and Payee, and reference is made to said Loan Agreement for matters governed thereby including, without limitation, certain events which will entitle the holder hereof to accelerate the maturity of all amounts due hereon.

This Note shall be governed and controlled by the internal laws of the State of Louisiana.

Without being limited thereto or thereby, this Note is secured by a Deed of Trust, Security Agreement, Financing Statement and Assignment of Production of even date herewith executed in favor of the Trustee named therein for the use and benefit of Payee, conveying unto said Trustee certain interests in and to the oil, gas and other minerals produced from certain lands situated in Crockett, Fort Bend, Frio, Goliad, Grimes, Hidalgo, Irion, Madison, San Patricio and Tom Green Counties, State of Texas.

ABCO ENERGY
CORPORATION

By: (Signature Illegible)

(ENDORSED)

Pay to the order of Cullen Center Bank and Trust

Barclays Bank International Limited

By: /s/ JAMES R. EASTER

James R. Easter
Assistant Vice President

APPENDIX E

EXCERPT OF MARCH 31, 1983 NOTE

A similar note for $700,000.00 was issued for value received payable at Barclays Bank International, Limited, New Orleans Agency, and endorsed on the back of the $700,000.00 note:

"Pay to the order of Cullen Center Bank and Trust"

Barclays Bank International, Limited

By: (Signed)

JAMES R. EASTER
Assistant Vice President

APPENDIX F

[042]

AFFIDAVIT

STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME THE UNDERSIGNED AUTHORITY, on this day personally appeared Mr. RICHARD M. PLATO, known to me, who on his oath avers as follows:

"I am Richard M. Plato. I am over the age of 21 and competent to make this Affidavit.

Barclays told ABCO to move its loan.

There were two ABCO notes to Barclays.

Cullen Bank could not confirm collateral fast enough to suit Barclays.

There was no deal between ABCO and Cullen without the absolute, unqualified, unrestricted and unconditional endorsement of Barclays Bank on both the $700,000.00 ABCO note and the $5 Million ABCO note.

Cullen Bank purchased the two ABCO notes from Barclays Bank on July 8, 1983 with the absolute, unqualified, unrestricted and unconditional endorsement of Barclays Bank on both the $700,000.00 ABCO note and the $5 Million ABCO note.

* * *

APPENDIX G

[041]

NO. 87-24794

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
190th JUDICIAL DISTRICT

CULLEN CENTER BANK & TRUST

v.

BARCLAYS BANK, PLC, ET AL.

AFFIDAVIT OF KAREN CELESTE HOLLEY

THE STATE OF TEXAS §
COUNTY OF DALLAS §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared KAREN CELESTE HOLLEY, known to me, who on her oath avers as follows:

"I am Karen Celeste Holley. I am over the age of 21 and competent to make this Affidavit.

I controvert the statements made by James Easter in his affidavit of February 11, 1988 which contradict my deposition testimony in this case—especially the false statement concerning the events of July 8, 1983 made by James Easter wherein Mr. Easter claims: "I asked her if the endorsement should say "without recourse," but she assured me this was unnecessary. She said that the Assignment reflected that the notes were without recourse and that all parties understood that Cullen Bank would not have recourse against Barclays."

. . .

APPENDIX H

[043]

NO. 87-24794

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
190th JUDICIAL DISTRICT

CULLEN CENTER BANK & TRUST

v.

BARCLAYS BANK PLC, ET AL.

AFFIDAVIT OF W. THOMAS GERALDS, JR.

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared W. Thomas Geralds, Jr., known to me, who on his oath avers as follows:

"I am W. Thomas Geralds, Jr. I am over the age of 21 and competent to make this Affidavit. I have worked as an officer of both Barclays Bank and Cullen Center Bank & Trust. I do not presently work for either Barclays Bank or Cullen Center Bank & Trust. I was an officer of Cullen Bank during the time when the Notes which are the subject of this case were purchased by Cullen Bank from Barclays Bank and I have personal knowledge of the facts in this Affidavit.

[044]

Cullen Bank relied on the representations of Barclays Bank regarding Barclays unqualified endorsement of the two Louisiana ABCO Notes in making Cullen Bank's

decision to purchase the two Louisiana ABCO Notes in 1983 after the maturity of the Notes.

The inoperative collateral draft assignment of June 29, 1983 was *not executed* as part of the endorsement of the two Louisiana ABCO Notes by Barclays Bank on July 8, 1983. The language on which Barclays relies was buried in the *draft* of the collateral assignment which Cullen Bank *rejected.*

Cullen Bank rejected the inoperative collateral draft assignment of June 29, 1983 as inadequate and insufficient for Cullen Bank to be willing to purchase the Notes from Barclays Bank after maturity, because Cullen Bank could not confirm the ABCO collateral, and only when Barclays offered its unqualified endorsement of the two Louisiana ABCO Notes did Cullen Bank agree to purchase the notes on July 8, 1983.

Cullen Bank did in fact rely upon the absolute endorsement contracts of Barclays Bank and against such absolute assurances Cullen Bank advanced millions of dollars to its detriment in justifiable reliance upon the promises of Barclays Bank.

The language of any so-called internal/"pink memos" is not controlling and such memos at Cullen Bank do *not* and are not

[045]

intended to control the contractual obligations of the parties to any loan transaction. The internal/"pink memos" are mere shorthand renditions intended for internal use only and therefore only set forth certain points surrounding a given loan transaction and are not a complete record of the loan nor does the language therein

control the contractual obligations of the parties. I am a disinterested party in this case. My only desire is to see complete justice done in light of the true facts."

FURTHER AFFIANT SAYETH NOT.

By: /s/ W. THOMAS GERALDS, JR.
W. Thomas Geralds, Jr., Affiant

APPENDIX I

[048]

NO. 87-24794

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
190th JUDICIAL DISTRICT

CULLEN CENTER BANK & TRUST

v.

BARCLAYS BANK, PLC, ET AL.

AFFIDAVIT OF W. THOMAS GERALDS

THE STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared W. THOMAS GERALDS, known to me, who on his oath avers as follows:

"I am W. Thomas Geralds. I am over the age of 21 and competent to make this Affidavit. I am a Senior Vice-president of Cullen Center Bank & Trust. I am familiar with the matters which are the subject of this suit. I controvert the Motion for Summary Judgment filed by Barclays Bank and the Affidavit of James Easter for Barclays

Bank insofar as they contradict the testimony I gave in my deposition in this matter.

Cullen Bank would not have purchased the ABCO Energy Corporation Notes from Barclays Bank without the unconditional endorsement of Barclays Bank. Barclays Bank gave its unconditional endorsement on the notes in order to induce Cullen Bank to purchase the notes after maturity before the collateral could be confirmed to the satisfaction of Cullen Bank."

FURTHER AFFIANT SAYETH NOT.

By: /s/ W. THOMAS GERALDS
W. Thomas Geralds, Affiant

SWORN TO, SUBSCRIBED AND ACKNOWLEDGED before me, the undersigned authority, under penalty of perjury, by W. THOMAS GERALDS, known to me, on this the 31st day of March, 1988.

By: Signature Illegible
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS. MY COMMISSION EXPIRES 5-19-89.

NAME: PATRICIA SCHMID

APPENDIX J

[396]

12 Did you at any time ever have the understanding
13 that the endorsements that you have just testified to
14 were supposed to be without recourse?

15 A. No, I did not.

16 Q. After July 8th, 1983 did Easter or anyone

else at Barclays ever call you and say that there had been a mistake on either of these two endorsements?

A. No.

Q. Did you ever try at any time on July 8th, 1983 to trick or deceive Mr. Easter?

A. No, I did not.

Q. Was July 8th, 1983 the first time you had ever met Mr. Easter?

A. It's the only time I've ever met Mr. Easter.

AFFILIATED REPORTERS—DALLAS, TEXAS

APPENDIX K

NO. 87-24794

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
190th JUDICIAL DISTRICT

CULLEN CENTER BANK & TRUST

v.

BARCLAYS BANK PLC, ET AL.

AMICABLE DEMAND FOR JURY TRIAL

COMES NOW, CULLEN CENTER BANK & TRUST, Plaintiff herein through its undersigned attorney of record and makes this its amicable demand for trial by jury in this case with payment of the applicable jury fee under the Constitution and Laws of the United States of America, the State of Louisiana and the State of Texas.

The right of trial by jury is hereby expressly reserved despite any resort to arbitration at any time. Cullen Bank desires to retain its right to trial by jury in this case unless and until waiver of the right to trial by jury is filed and entered in this case with the express written consent of counsel of record for Plaintiff Cullen Center Bank & Trust. Respectfully submitted,

MONTGOMERY & MONTGOMERY

APPENDIX L

EXCERPTS OF PLAINTIFF CULLEN CENTER BANK & TRUST'S FIRST AMENDED AND RESTATED ORIGINAL PETITION

. . . Cullen Bank purchased the two ABCO Energy Corporation Louisiana Promissory Notes after maturity on the strength of the Name and Indorsement of Barclays. Defendant Barclays failed to honor its obligations within the statutory Midnight Deadline of the Uniform Commercial Code . . . 4.302 . . . .

Barclays has claimed that the Laws of Louisiana . . . upon which Cullen Bank relies are mere "technicalities" which do not apply to Barclays. The Laws of Louisiana and the Statutes of the State of Texas are *not* "technicalities"—they are the Law of the Land entitled to Full Faith and Credit under the United States Constitution. . . . Based on the Letter of the Law and the Spirit of the Law, Barclays must yield to the Laws of Louisiana and the Laws of Texas and the Constitution of the United States of America in this case. . . .

In reliance on the two indorsements on the Louisiana negotiable instruments Cullen Bank agreed to lend $800,-

000.00 to ABCO on July 8, 1983 and thereafter advanced additional funds based on such reliance for a grand total in excess of $3.3Million in principal, interest, court costs and attorneys fees, after all just credits, offsets, and payments are allowed.

. . .

Barclays Bank has defied the Laws of the State of Texas. No affirmative relief can be granted to Defendant Barclays per V.A.T.S. 8.18, Texas Business and Commerce Code. Barclays Bank has conducted billions of dollars in business in the State of Texas without proper qualification or registration.

. . .

APPENDIX M

. . .

MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE LAWS OF THE STATE OF LOUISIANA . . . UNDER THE UNITED STATES CONSTITUTION FOR PURPOSES OF DECIDING THIS CASE

. . .

Both of the Louisiana ABCO Notes *are negotiable* under the Law of Louisiana.

. . .

The Supremacy Clause of the United States Constitution provides in Article VI: "This Constitution . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Full Faith and Credit Clause of the United States Constitution provides in Article IV: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State."

Thus, both Louisiana ABCO Notes are negotiable and entitled to full faith and credit in Texas under Article IV of the United States Constitution which requires each State to give effect to the official Acts of the other States.

. . .

Barclays chose the Law of Louisiana. Both ABCO Notes were made under the Law of Louisiana. Barclays is bound by its choice of Louisiana Law. The $5,000,000.00 Louisiana ABCO Note of April 28, 1982 clearly states that . . . all *endorsers* . . . waive notice . . . and the filing of suit . . . for the purpose of fixing liability . . . etc. Barclays cannot now avoid the consequences of its own actions in preparing the Louisiana ABCO Notes, which among other things make a *choice of law in favor of the Law of Louisiana.*

Barclays indorsed both Louisiana Notes after maturity. The liability of Barclays is fixed by the Law of Louisiana, by the contract in the Notes themselves, and by Barclays' indorsements on both the $5,000,000.00 Louisiana ABCO Note and the $700,000.00 Louisiana ABCO Note.

There is no dispute that the two ABCO Notes indorsed by Barclays Bank were made payable in New Orleans, Louisiana. There is no dispute that the substantive law governing the making of the two Louisiana ABCO Notes is Louisiana Law. There is no dispute that Louisiana Law makes both of the ABCO Notes negotiable. There is no dispute that Barclays indorsed both of the Louisiana ABCO Notes after maturity on July 8, 1983. Therefore,

there is no way for Barclays to avoid its liability.

The indorsement contract of the Uniform Commercial Code is crystal clear throughout the United States. Barclays is bound by the black letter of the law. Barclays is not above the law, despite alien claims of English immunity from its indorsement contracts. Cullen Bank is entitled to equal protection and due process under the Constitution which is the law of the land.

The capricious decision of Barclays Bank to ignore its indorsement obligations under the law amounts to nothing more than an arbitrary assertion of power by an alien bank, . . . thus denying Cullen Bank due process of law under the Constitution of the United States.

The essence of Barclays' argument is that might makes right, and that Barclays is above the law because it is an English bank which chooses not to obey the law or honor its obligations.

The request of Barclays for special judicial treatment in ignoring its obligations under its indorsement contracts on the instruments themselves would deny Cullen Bank Equal Protection of the Law under the Constitution of the United States, deprive Cullen Bank of its property rights in the indorsement contracts of Barclays Bank without due process of law violating the Fifth and Fourteenth Amendments to the Constitution of the United States, and would amount to the end of commercial certainty as to the indorsement contract not only in Texas and the United States, but throughout the world—including the United Kingdom.

The judgment which Barclays requests from this Honorable Court would destroy commercial certainty, chill contracts in commercial paper, create confusion and uncer-

tainty in the law, upset the ordinary process of indorsing negotiable instruments, destroy the operations of the Federal Reserve Bank discounts window, violate the Commerce Clause of the United States Constitution, restrain interstate commerce and impede commercial relationships throughout the world.

The commercial world depends on speed and certainty in the law—especially the law of the indorsement contract, whose certainty within the four corners of the instrument itself and inseverability from the instrument has created the certainty of the indorsement contract over the centuries both at civil law and at common law, enshrined under the Uniform Commercial Code, made manifest by the laws of Louisiana, upheld by the laws of Texas, and protected by the United States Constitution through the Interstate Commerce Clause, Due Process Clause, Equal Protection Clause, Full Faith and Credit Clause, Supremacy Clause, and the Fifth and Fourteenth Amendments to the United States Constitution. . . .

APPENDIX N

Affirmed and Opinion Filed December 13, 1990

IN THE
FOURTEENTH COURT OF APPEALS

NO. B14-98-00365-CV

CULLEN CENTER BANK & TRUST,
Appellant

v.

BARCLAYS BANK PLC, formerly
BARCLAYS BANK INTERNATIONAL, LIMITED,
Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 87-24794

OPINION

This appeal is from a summary judgment granted in favor of appellee, defendant in the trial court. Appellant sought to hold appellee liable as an endorser on promissory notes executed by ABCO Energy Corporation, as maker, to appellee, which notes were later conveyed to appellant. While presented in seven points of error, the sole issue is whether the trial court erred in granting summary judgment. We affirm.

The basic facts are undisputed. *See Endnote 1.* In April, 1982, appellee (Barclays entered into a revolving loan agreement with ABCO Energy Corporation (ABCO)

where Barclays was to extend a revolving line of credit to ABCO up to $5 million. The line of credit was limited by the collateral, *See Endnote 2,* and ABCO executed a note in that amount. Barclays advanced the sum of $700,000 under terms of the note. In early 1983, ABCO was seeking a new lender to replace Barclays, and, having been unable to complete the arrangements by the time the note matured, ABCO executed a 60-day, $700,000 note as a renewal and extension of the April, 1982, note. The renewal note was due May 30, 1983. *See Endnote 3.*

In May or June, 1983, ABCO and appellant (Cullen) had reached an agreement, *See Endnote 4,* where Cullen would be taking over the loan made by Barclays. On July 8, 1983, Cullen and ABCO closed on an $800,000 loan to ABCO as a renewal and extension of the $700,000 loan Barclays had made to ABCO. *See Endnote 5.* Barclays assigned, *See Endnote 6,* to Cullen its loan to ABCO. The collateral for the $800,000 loan was the same oil and gas properties previously pledged to Barclays. Barclays assigned its security interest in the oil and gas properties to Cullen and endorsed (insert—*by indorsing*) the notes, "Pay to the order of Cullen Center Bank & Trust Barclays Bank International Limited." The endorsement was signed by an assistant vice-president. Contemporaneously, a separate written document entitled "Assignment of Promissory Notes, Liens, and Security Interests" was executed by Barclays, which assignment, among other matters, provided, "The Assignment is made by Assignor without warranty or recourse, either express or implied." This was the document by which the collateral was actually transferred and assigned. *See Endnote 7.* The remainder of the facts are

self-evident—Cullen loaned more money; ABCO defaulted on the notes, and Cullen is attempting to hold Barclay liable.

Based upon these facts, appellant states, and appellee agrees, the issue is simple: "Did the 'without . . . . recourse' language of the Assignment (a separate document supersede the endorsements on the two notes, on their faces are with recourse? The trial court held it did, and we agree. *See Endnote 8.*

First appellant contends that Louisiana law controls the disposition of this case because the original $5,000,000 note provided that it was governed by the laws of Louisiana and both that note and the $700,000 note were payable in Louisiana. This contention is important, appellant contends, on the issue of negotiability of the notes, *See Endnote 9,* which bore interest at Barclays' Prime Rate (as hereinafter defined), from time to time in effect, plus one and one-half percent." Unlike Texas law,[1] which provides that a note is not negotiable unless it contains an unconditional promise or order to pay a sum certain in money "which can be made from the instrument itself without reference to any outside source," Louisiana law apparently provides otherwise. La. Rev. Stat. Ann. 9:3509. In all other respects, the provisions of the Uniform Commercial Code (UCC) applicable to this case are identical in Texas and Louisiana. *See Endnote 10.* Here, whether the notes are negotiable appears to be inconsequential. *See Endnote 11.*

Therefore, whether we apply Texas law or Louisiana law, our analysis is the same. *See Endnote 12.* The

1. Tex. Bus. & Com. Code Ann. § 3.104(a)(2), and 3.106.

assignment, which was delivered *contemporaneously* with the notes, is effective for all purposes, *See Endnote 13*, and limits Barclays' liability on the endorsements to Cullen. Section 3.119(a) of the UCC[2] provides:

> (a) As between the obligor and hisi immediate obligee of any transferee the terms of an instrument may, *See Endnote 14*, be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument. *See Endnote 15*.

Where two or more instruments, executed contemporaneously, pertain to the same transaction, the instruments will be read together even though they do not refer to each other. *Meisler v. Republic of Texas Savings Ass'n.*, 758 S.W.2d 878, 884 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Texas State Bank of Austin v. Sharp*, 506 S.W.2d 761, 763 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.). *See Endnote 16*. As between the immediate parties a negotiable instrument is merely a contract, and is no exception to the principle that the courts will look to the entire contract in writing. U.C.C. § 3.119 (official comment). Accordingly, a note may, *See Endnote 17*, be affected by any relevant term in a separate writing. *Id.*

Cullen does not claim, nor could it do so, that it fits into the holder in due course exception. *See Endnote 18*. Therefore, the trial court properly concluded that the

---

2. Tex. Bus. & Com. Code Ann. § 3-119 and La. Rev. Stat. Ann. § 10:3-119(1) are identical to UCC § 3.119(a). (Added) - But the La. Civil Code governs as the Higher Law.

without recourse provisions of the assignment controlled. *See Endnote 19.* Appellant's first two points are overruled.

In its third and fourth points of error appellant contends summary judgment was improperly granted on the $700,000 note because the assignment "does not purpose to modify" that note, but only the $5,000,000 note. Barclays correctly notes that Cullen did not assert this issue in opposition to the motion for summary judgment. *See Endnote 20.* Having failed to do so, Cullen may not now assert this issue on appeal. *See Endnote 21. City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671 (Tex. 1979). Appellant's third and fourth points are overruled.

In its fifth and sixth points of error appellant contends summary judgment was improperly granted because Barclays failed to comply with § 4.302 of the U.C.C.[3] (the midnight deadline rule).

Section 4.302 provides:

> In the absence of a valid defense such as breach of a presentment warranty (Subsection (a) of Section 4.207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of
>
> (1) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository

3. Tex. Bus. & Com. Code Ann. § 4.302, La Rev. Stat. Ann. § 10:4-302 and UCC § 4.302 are identical.

bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) any other properly payable item unless within the time allowed for acceptance or payment of that item the bank either accepts or pays the item or returns it and accompanying documents.

In 1987, an attorney for Cullen formally demanded payment of Barclays on the $700,000 note drafting on Barclays. The original of the note was delivered along with the draft, but "no payment, no notice of dishonor, nor return of the draft" was made by Barclays Bank to Cullen Bank within the midnight deadline.

Cullen argues the midnight deadline rule "simply creates liability unless a bank properly responds to a legitimate demand item," but cites no authority supporting the application of the rule to the facts presented, nor could it do so. *See Endnote 22*. The policy behind the midnight deadline rule is to prevent a bank from retaining a demand item to assure funds will be available to pay the demand item. The bank must either pay the item, give notice of dishonor, or return the item by midnight on the next banking day following the banking day on which it receives the demand item. UCC §§ 4.302(1) and 4.104 (a)(8).[4]

Barclays correctly points out that § 4.301(1) cannot apply because: (1) Barclays is not a payor bank; *See Endnote 23;* (2) the note presented is not a demand item, *see Endnote 24*, and (3) Cullen is not a customer entitled to the benefit of § 4.302(1). *See Endnote 25*. A payor bank

4. Tex. Bus. & Com. Code Ann. § 4.104 and La. Rev. Stat. Ann. § 10:4-104 are identical.

is the bank on which the check, *see Endnote 26*, is drawn, and which makes payment according to the depositor's instructions on the check *Pulaski Bank and Trust Co. v. Texas American Bank/For: Worth, N.A.*, 759 S.W.2d 723, 725-26 (Tex. App.—Dallas 1988, writ denied). Barclays cannot be the payor bank subject to the mid-light deadline rule. *See Endnote 27.*

Further, the note, *see Endnote 28*, presented is not a legitimate demand item under § 4.302(1). Promissory notes providing for a specific payment date are not demand items under the UCC. *Horney v. Covington County Bank*, 716 F.2d 335, 337 (5th Cir. 1983). An instrument in which no time for payment is stated is payable on demand. *Gill v. Commonwealth Nat'l Bank*, 504 S.W.2d 521, 523 (Tex. App.—Dallas 1973, writ ref'd n.r.e.). *See Endnote 29.*

Finally, Cullen is not a customer of Barclays. Section 4.302(1) states the rights of the customer if the payor bank fails to take the action within the prescribed time limits. A customer is a person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank. UCC § 4.104(a)(5). Cullen does not fall within that definition. Appellant's fifth and sixth points are overruled. *See Endnote 30.*

Finally, in its seventh point of error, Cullen contends summary judgment was improper because there is a fact issue on whether the parties intended the endorsement to be with recourse. *See Endnote 31.* Cullen relies on three affidavits executed by Thomas Geralds, an officer of Cullen Bank at the time of the transfer of the notes. Two of the affidavits—one executed on August 11, 1989, and the other executed on March 31, 1988, were attached to

Cullen's response to Barclays motion for summary judgment. The last affidavit was executed February 8, 1990, some two months after the order granting summary judgment was signed. *See Endnote 32.* This affidavit, not having been before the trial court at the time of the summary judgment hearing, is not properly before this court.

The affidavit of March 31, 1988, is improper summary judgment proof because it does not state that it is based on facts within his personal knowledge and obviously only contains his opinion. *Brown Foundation Repair and Consulting, Inc. v. Friendly Chevrolet*, 715 S.W.2d 115, 117 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Tex. R. Civ. P. 166(e). Finally, the affidavit executed on August 11, 1989, is insufficient to raise a fact issue. While he attempts to swear to facts concerning the execution of the assignment of the notes on behalf of Cullen Bank, the evidence conclusively shows that he was not present at the time of closing and could not, therefore, have personal knowledge that "Cullen Bank relied upon the representation of Barclays Bank regarding unqualifed endorsement" of the two notes or that "the Assignment of June 29, 1983 was not executed as part of the endorsement of the two" notes. *See Endnote 33.* Appellant's seventh point is overruled.

The judgment is affirmed.

/s. SAM ROBERTSON
Justice

Judgment rendered and Opinion filed December 13, 1990.
Panel consists of Justices Robertson, Sears, and Draughn.
Do Not Publish—Tex. R. App. P. 90.

ENDNOTES TO OPINION

1. Contra—Affidavits of Richard Plato, Karen Holley, and Tom Geralds plus deposition testimony of Karen Holley and video affidavit—Holley. (Second supplemental transcript 042, 041, 043, 044, 045, and 048 plus deposition testimony p. 396 ll. 12-15): at Appendix N, pages 12a - 18a.

2. Not in the record.

3. Negotiated after maturity—but not "overdue". (All payments were brought current prior to the indorsements)

4. No binding agreement was ever reached in May or June, 1983 as no consideration was ever given—and none was exchanged until July 8, 1983—the operative date of the two indorsement contracts.

5. Contra—The $800,000 note specifically states that it is a renewal of the $5 million note.

6. Contra—Barclays *negotiated* its notes to Cullen by *indorsements* not by an *assignment*.

7. False as a matter of law and fact.

8. This is impossible by law: U.C.C. 3-414(a) and 3-202(b).

9. And *on* exclusion of extrinsic evidence contra to the notes (Louisiana Civil Code Article 2276—now Article 1848 as well as *caveat vendor* (Article 2474) *v. caveat emptor*.

10. False. The Civil Code is broader and Louisiana does *not* have Article 2 on sales.

11. False: This is the critical issue.

12. If the notes are negotiable they are governed by their indorsements by law. If non-negotiable then there is a fact question for trial on the "assignment". See U.C.C. 3-119.

13. False—The assignment is a *nude pact* and inoperative.

14. *Not must*—This is itself a *fact* question for trial in U.C.C. 3-119.

15. Cullen is a holder through a holder in due course. 3-119 does not apply to Cullen Bank as a third party beneficiary indorsee—the consideration came from ABCO.

16. Contra—Texas Supreme Court. See *Peavy-Moore Lumber Co. v. First National Bank of Beaumont,* 128 S.W.2d 1158, at 1163 (Tx. Comm. of Appeals—Opinion Adopted by Supreme Court 1939) and *Lawler v. Nettleton,* 691 S.W.2d 593 at 597 (Tex. Sup. Ct. 1985).

17. Fact question for trial not summary judgment.

18. Contra—Cullen is a holder through a holder in due course entitled to all holder in due course rights by law.

19. Contra—Assignment controlled *nothing*. The Indorsements govern.

20. False—See 3/31/89 Opposition to Motion for Summary Judgment and page (011) attached excerpt at Appendix N, page 34a - 35a (Taken from January 19, 1989 opposition to Barclays Motion for Summary Judgment.)

21. False—often asserted, also see endnote 20.

22. The opposite by its plain language.

23. False—Barclays is the payor bank as drawee.

24. False—The *note and draft* were both demand items —after maturity but not "overdue".

25. Customer status has nothing to do with the right to draw a draft. 716 F.2d 339.

26. *or draft* or any other *item* for the payment of money.

27. False: So held by the Fifth Circuit in *Horney,* 716 F.2d 335 at 339.

28. The *draft* is a legitimate demand item by itself—so is the note.

29. The actual holding of *Horney* supports Cullen and

strikes down one by one each of Barclays arguments in the 5th Circuit opinion.

30. The $715,000 was held by Barclays per the ABCO-Barclays transaction. Cullen had the right to draw on Barclays for this amount and did so.

31. The UCC defines "parties" v. "third parties". There is an underlying fact dispute between ABCO and Barclays as the "parties." Cullen is not charged with notice or bound to accept any limitation as third party beneficiary contract indorsee.

32. False—The Order was signed March 2, 1990.

33. It is self-evident that *no one* from Cullen Bank was present at the ABCO-Barclays closing. Karen Holley acted as agent for ABCO in delivering ABCO's funds to Barclays. Cullen's rights arose in the first separate transaction (the ABCO-Cullen $800,000 closing). Cullen is therefore a holder through a holder in due course. (ABCO paid Karen Holley's fees to attend the closing with Barclays as ABCO's representative). Cullen Bank is entitled to all of the rights of a holder in due course. The so-called "Assignment" is inoperative on anyone and anything. The indorsements *on* the notes govern the notes and the collateral. Just because Mr. Plato and Mr. Geralds were not present does not mean they had no personal knowledge of the fact that the indorsements were unqualified.

EXTRINSIC EVIDENCE IS INADMISSIBLE

The alleged draft of an Assignment dated June 29, 1983 forms no part of the indorsement contract of July 8, 1983. It is extrinsic, without consideration, pertains only to collateral, was never agreed upon, is not contemporaneous, references only the $5,000,000.00 note—and not the $700,000.00 note, has the name of Cullen Bank incorrectly stated, and is obviously only a draft which was never executed and has no effect whatsoever with respect

to Barclays' indorsement contract. Extrinsic evidence is inadmissible to alter, vary, or contradict the indorsement terms of a negotiable instrument. *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Houston, 1977).

[011]

VI.

VARIABLE RATE LOANS ARE NEGOTIABLE IN LOUISIANA

APPENDIX O

IN THE
SUPREME COURT OF TEXAS

NO. D-0845

September 5, 1991
From HARRIS County, 14th District.

CULLEN CENTER BANK & TRUST

v.

BARCLAYS BANK PLC (Formerly
BARCLAYS BANK INTERNATIONAL LIMITED)

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, Cullen Center Bank & Trust, and surety, Universal Surety of America, pay all costs incurred on this application.

* * * *

NO. D-0845

October 9, 1991
From HARRIS County, 14th District.

CULLEN CENTER BANK & TRUST

v.

BARCLAY BANK PLC (Formerly
BARCLAYS BANK INTERNATIONAL LIMITED)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX P

* * * *

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 9, 1991

Mr. William S. Montgomery
Montgomery & Montgomery
1422 Summit Tower
11 Greenway Plaza
Houston, TX 77046

Mr. N. K. Alexander, Jr.
Baker & Boots
One Shell Plaza
910 Louisiana Street
Houston, TX 77002

Honorable Joe R. Greenhill
Baker & Botts
1600 San Jacinto Center
98 San Jacinto Blvd.
Austin, TX 78701

Ms. Carolyn B. Southerland
Baker & Botts
One Shell Plaza
910 Louisiana Street
Houston, TX 77002

RE: Case No. D-0845

Style: CULLEN CENTER BANK & TRUST
v. BARCLAYS BANK PLC (Formerly
BARCLAYS BANK INTERNATIONAL
LIMITED)

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk

By
Courtland Crocker, Deputy